

Public School Open Enrollment Technical Assistance Workshops

- Defending an Appeal
- Undue Financial Burden

January 2002

Defending an Appeal

Right to Appeal

- Open enrollment statutes & administrative rules permit a parent to appeal a denial to the DPI within 30 days of receipt of the notice of denial.
- The DPI is required to uphold the school board's decision unless we find the decision was arbitrary or unreasonable.

Appeals “History”

	1998-99	1999-00	2000-01	2001-02	4-year-total
Total Appeals	246	546	137	221	1150
Decision Affirmed	82	112	55	108	357
Decision Overturned	119	29	52	63	263
Dismissed or Closed	45	405	30	50	530

<i>excl. racial balance</i>	1998-99	1999-00	2000-01	2001-02	4-year-total
Total Appeals	143	222	137	221	723
Decision Affirmed	75	108	55	108	346
Decision Overturned	49	29	52	63	193
Dismissed or Closed	19	85	30	50	184

The Appeals Process

- District makes a decision to deny
- District sends notice of denial
- Parent sends appeal to the department
- Department requests record of decision
- District submits record
- Parent & district submit briefs & reply briefs, if desired
- DPI decides & issues order

Reasons School Board Decisions Were Overturned

- Misapplication of law, especially with respect to application of preferences
- Inconsistent application of criteria
- Errors in processing, especially with respect to calculation of percent limit
- Lack of information provided to the department
- Lack of *evidence* of a process used to make determinations
- Decision was arbitrary or unreasonable

How to Have Your Decision Upheld

- Be careful what you say
- Make a good decision - neither arbitrary nor unreasonable
- Make proper notification
- Submit a complete record
- Explain your decision - file a brief
- Respond to parents' arguments - in a brief or a reply brief

Make a Good Decision

- Understand the requirements of the statutes and administrative rules
- Establish policies, procedures & criteria that are consistent with the statutes and administrative rules
- Follow them consistently; or have a rational reason for varying from them
- Review previous appeals & correct past mistakes

- Neither arbitrary nor unreasonable
 - *synonyms for arbitrary*: subjective, uninformed, illogical, capricious
 - *antonym for arbitrary*: logical
 - *synonyms for unreasonable*: irrational, perverse, unfair
 - *antonyms for unreasonable*: sensible, rational, logical, sound, even-handed, equitable

Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable or does not have a rational basis. Arbitrary action is the result of an unconsidered, willful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.

State ex rel. Smits v. City of DePere, 104 Wis. 2d 26, 37-38 (1981), quoting Olson v. Rothwell, 28 Wis. 2d 233, 239 (1965).

The test for whether an agency's determination is arbitrary is whether it can be said that such action does not have a rational basis.

See Incorporation of Town of Pewaukee, 186 Wis. 2d 515 (Ct.App. 1994).

Make Proper Notification

- Notice of denial must be postmarked by deadline date.
 - A late denial constitutes an approval
 - Recommend certified mail or affidavit of mailing

- Notice of denial must include written reason for denial
 - Provide all reasons denial was made--you will not be permitted to defend additional reasons on appeal
 - An informative letter may thwart an appeal:
 - DPI form is recommended, but include additional information if desired
 - However, attachments become part of the record, so say what you mean

- Notice of denial must include notice of right to appeal
 - DPI form includes this notice
 - Failure to include notice of right to appeal does not constitute approval, but it may extend the period for filing an appeal.

Submit a Complete Record

- Failure to submit a record is highly likely to result in a finding that the decision was arbitrary.
 - DPI will not necessarily make a 2nd request.
- Failure to submit a complete record may result in a finding that the decision was arbitrary.
 - If a large number of appeals have been received, DPI may not have time or resources to request missing information.

- Submit all documentation - if in doubt, include it
 - *However, please do not include sets of DPI bulletins and workshop slides. Either refer to the specific bulletin or workshop or include only relevant pages*
- If documentation is unclear or not specific, use affidavits to explain process
- Provide evidence of your process, which must include a winnowing and sifting of information

File a Brief

- A brief is your “argument” in the case. It is your chance to explain your decision and tell us why we should uphold it.
 - Do not assume your data explains itself.
- Does not have to be a formal brief, can be a letter. Minimally, a brief would consist of:
 - a statement of the facts of the case
 - argument
- Respond to parents’ arguments at least briefly, even if they seem irrelevant.

Requested Information

Requested Information

All Appeals

- A copy of the application, stamped with the date received
- A copy of the denial notice, including proof of service upon the pupil/parents
- A copy of the school board policy and administrative rules or procedures
- Minutes, tape recording or transcript of all meetings or hearings where open enrollment was discussed either generally or as it pertains to the appellant

Requested Information

Denial Due to Lack of Space

- Any data, including but not limited to:
 - Current and projected enrollment in school, grade, class or program
 - Any class size limits, pupil teacher ratios, enrollment projections est. by the board, any other criteria used
 - Number of students, by grade, applying to attend the school district, number approved, number rejected

- Any administrative procedures used to select students, including but not limited to:
 - Explanation of how preferences were applied
 - If random selection used, a description of the random selection process, including:
 - method of random selection
 - circumstances (who, where, when)

- Document how determinations were made
 - It is not enough to say “There is no room”
 - Student-teacher ratio: provide support that this ratio is actually in practice, and if not, what is being done to achieve it
 - Provide enrollment numbers, classroom size, class size, school size, school capacity to support your decision
 - Provide any other documentation to support your class size or capacity determination that was used by the board

- **If you deviate from your space criteria, be sure to explain why you did so**
- **Do not make exceptions for individual children**
 - Grant only preferences that are permitted by statutes.

Requested Information Special Education Availability & Space

- Copy of the student's IEP
 - explain special education/services needed
 - provide evidence that the student's needs were considered individually
- Any class size limits or pupil-teacher ratios established by the board
- Current & projected enrollment in the special education/related services required by the student's IEP
- Any other data relevant to the appeal.

- . Avoid blanket statements, such as “program is full”. Services required by the individual’s IEP must be considered, not “label”
- . Be sure enrollment numbers you use are the same as what has been submitted to DPI for other purposes, if different, explain

Requested Information

Percent Limit

- Enrollment on the most recent 3rd Friday in September
- The number of students attending nonresident districts under OE as of end of application period
- Percent limitation adopted by the board
- Number of students applying to transfer
- Number of students entitled to preference
- Number of students approved for transfer

- Any administrative procedures used to select students, including but not limited to:
 - Explanation of how preferences were applied
 - If random selection used, a description of the random selection process, including:
 - method of random selection
 - circumstances (who, where, when)

Undue Financial Burden

What is Undue Financial Burden?

- If the costs of the special education program or services required in the IEP for a child with a disability whose parent has submitted an open enrollment application, as proposed to be implemented by the nonresident school district, would impose upon the child's resident school district ...

- *... an undue financial burden in light of the resident school district's total economic circumstances, including*
- *its revenue limit*
- *its ability to pay tuition costs for the pupil and*
- *the per pupil special education costs for children with disabilities continuing to be served by the resident school district ...*

- ... the child's resident school board may notify the child's parent and the nonresident school board by the first Friday following the first Monday in April [April 5, 2002] that the pupil may not attend the nonresident school district to which the child has applied.

Key Elements

- costs of the special education program and services required in the IEP
 - must make an individual determination for each child based on the cost of implementing the student's IEP

Key Elements

- as proposed to be implemented by the nonresident school district
 - may not deny simply because the nonresident school district would implement the IEP differently or because program can be provided in resident school district
 - must have a detailed estimate of tuition costs from the nonresident school district

Key Elements

- would impose an *undue* financial burden
 - *while it may be argued that any payment of tuition would impose a financial burden, the district must examine its economic circumstances and determine whether that burden is “undue”*

Key Assumptions

- The statute clearly intends that students who need special education are eligible to participate in open enrollment--a resident district may not deny a student the ability to transfer simply because the district must pay tuition for the student

Key Assumptions

- The department's interpretation is that undue financial burden is a subjective determination not able to be defined by a simple formula--it is unique to the circumstances of each school district.
- However, it is possible to establish a uniform method of determining the net cost to the district and to define certain basic elements for examining the effect on the district's total economic circumstances.

“Test” is on Appeal

- The school board’s decision is not reviewed by the Department unless the parent appeals. In reviewing the appeal, the Department will determine:

- Whether the decision was arbitrary
 - must have a process to consider effect of tuition cost on district.
 - there is no process defined in statute or rule for determining undue financial burden.
- Whether the decision was reasonable
 - result of process must be consistent, fair and reasonable.

How to Have Your Decision Upheld

- **Make a good decision** - neither arbitrary nor unreasonable
- Make proper notification
- **Submit a complete record**
- **Explain your decision** - file a brief
- Respond to parents' arguments - in a brief or a reply brief

Make a Good Decision

- The correct order for making an undue financial burden decision is:
 - ★ obtain the cost of the tuition
 - ★ examine the district's total economic circumstances
 - ★ and then decide whether the cost is an undue financial burden.

Emphasis on Process

- Determine the net OE tuition cost
- Review the effect on the special education programs in the resident school district
- Review the effect on the district's total economic circumstances, including:
 - its revenue limit and
 - its ability to pay the tuition costs
- Based on the above calculation and review, determine whether the cost is an undue financial burden

Net OE Tuition Cost

Total Tuition Cost

- OE Regular Ed. Amt. \$5,045
- Savings
- Categorical Aid
- = Net OE Tuition Cost

Net OE Tuition Cost

Total Tuition Cost	\$12,000
- OE Regular Ed. Amt.	\$ 5,045
- Savings	0
- Categorical Aid	<u>\$ 3,600</u>
= Net OE Tuition Cost	\$ 3,355

Review the Effect on Special Education Programs...

- Is there a significant increase in the per pupil cost of the special education program as a result of the student leaving?
- What is the district's ratio of special education expenditures to total instructional expenditures?

- Is the current pupil teacher ratio within the range of the optimal* pupil/teacher ratio of the school district?
- Would the student's transfer have a negative, positive or no effect on the pupil/teacher ratio compared to the optimal* pupil/teacher ratio?

*"*optimal*" is the desired pupil/teacher ratio defined by the school board

Review the Effect on Total Economic Circumstances

- Revenue Limit
- Ability to Pay

- Are district enrollments increasing so as to provide more revenue for the district?
Increasing so quickly that construction will be necessary? Decreasing so that revenue is decreased? Flat?
- Does the district have flexibility to levy more under the revenue limits?
- Does the district have an undesignated fund balance from which it could fund the tuition?
- Does the district take in more or less revenue than it expends?

- Is the district eligible for a transfer of service revenue limit exemption for the student's tuition costs?
- Are there other factors that the school district believes is relevant to making the decision about whether the net open enrollment tuition cost imposes an undue financial burden?

Transfer of service...

- If the student is applying for open enrollment due to a move into the resident school district, and
- The student was receiving special education prior to the move and,
- Will be receiving special education after the move...

...The resident district is probably eligible for a transfer of service exemption to the revenue limits.

- Exemption = the tuition amount paid to the nonresident school district less any applicable categorical aid
- Must file request no later than July 1 to receive exemption for the current school year.

Determine Whether the Cost is An Undue Financial Burden

- There is no “magic” number or formula and no piece of data can be automatically assumed to be either positive or negative to an argument of undue financial burden.
- **The school board must review the data and make a determination.** If the decision is appealed, the department must review the determination based on the information the district provides.

Submit a Complete Record

Explain the Decision

- Use the DPI form
- Explain how the district used the data on the form to examine its total economic circumstances
- Explain why the cost is an undue financial burden
 - Be sure the data and your explanation agree
 - Explain any data that appear not to support your conclusion
 - Explain the consequences to the district of paying the tuition

DPI Form

- The DPI has created a form (PI-9414) for submitting the record of the decision in case of an appeal. This form requests a variety of data intended to elicit information about effect of the transfer on the “total economic circumstances of the school district.
- It is recommended that school districts use this form to gather data to *assist the school board in making the decision.*

Unconvincing Arguments

- The resident district can provide the services, so it should not have to pay for open enrollment
 - *The district provides regular education and yet non-disabled students must be approved to leave up to the % limitation. Districts cannot discriminate against disabled students.*
- It is a financial burden to pay for special education when we already have the program
 - *The statute requires the financial burden to be “undue”*

Unconvincing Arguments

- The nonresident district is charging for services we would not provide
 - *The fact that the nonresident district might implement the IEP differently is irrelevant. The only relevant issue is whether the district can afford to pay the cost.*
- The revenue controls limit what we can spend.
 - *The revenue controls limit what every district can spend. What, specifically, about the revenue limits makes your district unable to afford the tuition?*